Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-359

WILLIAM J. HORD AND BLANCHE M. HORD, APPELLANTS

V.

REUBEN ASKEW, ETC., ET AL, APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellees Department of Revenue of the State of Florida and Okaloosa County School Board move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Florida on the grounds as follows:

1. The appeal is not taken in conformity with the rules of this Court, and specifically with Rule 13, Supreme Court Rules, in that this appeal was not docketed within ninety days of the entry of the judgment of the Florida Supreme Court herein sought to be appealed,

2. This appeal does not present to this Court a substantial federal question, and

3. It is manifest that the decision below rests on adequate state grounds.

STATEMENT OF THE CASE

A. Factual Background

In 1953 the Legislature of the State of Florida passed a special act, Chapter 29336, Laws of Florida. This act authorized the County Commissioners of Okaloosa County, Florida to develop and lease to others for development certain lands owned by it on Santa Rosa Island. The authority granted by that act was required to be vested in a board created therein to be known as the Okaloosa Island Authority. Paragraph 11 of Section 2 of the act gave the County Commissioners, and hence derivatively the Okaloosa Island Authority, the general power to contract to carry out the powers and duties of the act. No specific authority to contract for tax exemption was contained in the act, however. Section 9 of the Special

Act provided that all real property owned by the county or Island Authority, including real property leased to others by them, should be exempt from ad valorem taxes of every kind. The Special Act became effective July 1, 1953.

Some five years later, on September 25, 1958, the Appellants, William J. Hord and Blanche M. Hord, entered into a lease agreement with the Okaloosa Island Authority for a certain parcel of property on Santa Rosa Island in Okaloosa County. The Hords agreed to pay a total of $4,000.00 under terms set out in that agreement. An additional annual rental, in the amount of $75.00 at the time of the agreement, was provided for. The term of the lease was for a period of ninety-nine years with the lessees given an option to renew under the same terms for an additional ninety-nine years.

Title to any permanent buildings or improvements placed on the property by the lessees was to vest in Okaloosa County, subject to the terms of the lease. The two-page lease, containing thirteen paragraphs, made no mention of ad valorem taxes or exemption therefrom.

In 1971, the Legislature of the State of Florida passed Chapter 71-133, Laws of Florida. Section 14 of that act repealed "[a]ll special and local acts or general acts of local application granting specific exemption from property taxation." Section 16 of the act provided that leasehold interests in property owned by any political subdivision, agency, authority or other public body of the state should be subject to ad valorem taxation unless expressly exempted. The act took effect December 31, 1971. For 1972 and each succeeding year, qualified leasehold

interests on Santa Rosa Island, including the Hords' property subject hereof, have been assessed for ad valorem taxes by Okaloosa County and the Okaloosa County School Board. No ad valorem taxes were assessed against Santa Rosa Island leasehold interests until 1972 because of the existence of the ad valorem tax exemption provided by Section 9 of Chapter 29336, Laws of Florida, not because of the existence of any contractual covenants proscribing ad valorem taxation.

B. Proceedings Below

This case began with a two-count complaint for declaratory judgment filed by Appellants in the Circuit Court of the First Judicial Circuit of Florida in and for Okaloosa County, Florida, the state court of general trial jurisdiction for the county in which the property is located. Count One named as defendants

the Honorable Reuben Askew as Governor of the State of Florida, the Honorable Robert L. Shevin as Attorney General of the State of Florida, the Honorable Howard Hilburn as Property Appraiser of Okaloosa County, Florida, the Honorable Joseph "Buck" Stokes as Tax Collector of Okaloosa County, Florida, J. Ed Straughn as Executive Director of the Department of Revenue of the State of Florida, The State of Florida itself, Okaloosa County, the Okaloosa County School Board, and the Board of County Commissioners of Okaloosa County. Count One alleged that exemption from ad valorem taxes was part of the leasehold agreement which appellants had entered into and sought a declaration that the provisions of Chapter 71-133, Laws of Florida, which repealed appellants' ad valorem tax exemption and subjected their leaseholds to ad valorem taxation impaired the obligation of their contract,

either per se or as applied. Count One also prayed that the taxing authorities be enjoined from levying or collecting taxes on their property. Count Two named as defendants only Okaloosa County and the Board of County Commissioners of Okaloosa County, and alleged that they were contractually estopped from imposing ad valorem taxes on appellants' property and prayed for an injunction against their doing so. The Complaint had attached to it the leasehold agreement in question, thereby making it a part of the Complaint. See Rule 1.130, Florida Rules of Civil Procedure.

Answers and motions for judgment on the pleadings were filed on behalf of defendants Robert L. Shevin, J. Ed Straughn, Howard Hilburn, State of Florida, and Okaloosa County School Board. These motions alleged generally that under the facts properly pled in the complaints,

the legal issues raised as to each of these defendants had been fully resolved adverse to Plaintiffs' interests by the case of Straughn v. Camp, 293 So.2d 689 (Fla. 1974), appeal dism. 419 U.S. 891, 95 S.Ct. 164, 42 L.Ed.2d 135 (1974). A hearing was held on these motions before the Honorable Erwin Fleet, Circuit Judge. Following the hearing, Judge Fleet entered a Partial Final Judgment, granting the Motions for Judgment on the Pleadings as to all moving defendants. The case remained pending in Circuit Court as to those defendants who had not filed motions.

The Hords appealed the Partial Final Judgment to the District Court of Appeal, First District of Florida. On motion of the Department of Revenue, the case was transferred to the Supreme Court of Florida as laying within the appellate

jurisdiction of that court rather than a District Court of Appeal. Briefs were filed on behalf of the Hords, the Department of Revenue, and the Okaloosa County School Board. Oral argument was had.

Thereafter, on May 18, 1978, the Florida Supreme Court entered its opinion affirming the judgment of the trial court per curiam on the authority of Straughn v. Camp, supra. No petition for rehearing was addressed to this order. Notice of Appeal to this Court was filed in the Florida Supreme Court on June 19, 1978.

ARGUMENT

POINT I

THE APPEAL IS NOT BEING TAKEN IN CONFORMITY WITH THE RULES OF THIS COURT.

Rule 13(1), Supreme Court Rules, requires that a case be docketed within ninety days from the entry of the judgment appealed from. The present case was docketed on August 30, 1978. The judgment from which the appeal was taken was entered by the Florida Supreme Court on May 18, 1978. Thus, this appeal was docketed some one hundred and four days after the entry of the judgment appealed from.

It may well be that appellants were under the mistaken impression that their time did not begin to run until fifteen days after the date on which the opinion of the Florida Supreme Court was filed. However, this most definitely is not the case. Admittedly, the opinion of the Florida Supreme Court did bear the legend

at the top, "Not Final Until Time Expires to File Rehearing Petition and, If Filed, Determined." Rule 3.14a, Florida Appellate Rules, 1962, does allow fifteen days for the filing of a petition for rehearing. Thus, there is no question but that appellants could have petitioned for rehearing from the opinion of the Florida Supreme Court within fifteen days of the filing of the opinion below, and that, had they done so, that opinion would not be considered to have been rendered or entered within the meaning of Rule 13, Supreme Court Rules, until the filing of an order disposing of the petition. However, appellants made no effort to petition for rehearing. Under those circumstances, the judgment of the court is considered rendered or entered as of the date it was filed, not as of the date time expires to petition for rehearing.

In Florida jurisprudence, the rule is that if an act may be taken within a certain period of time which would render an otherwise final order non-final, but that act is not taken, the order is considered rendered as of the date of its original entry for purposes of computing time for subsequent appellate proceedings. Brenner v. Gelernter, 90 So.2d 306 (Fla. 1956).

POINT II

THIS APPEAL RAISES NO SUBSTANTIAL FEDERAL QUESTION.

Appellants urge that the question of whether Chapter 71-133, Laws of Florida impairs the obligation of their leasehold contract for, according to them, total ad valorem tax exemption during the duration of the lease, is a substantial federal question. Appellants seems to recognize that the holdings of the trial court and Florida Supreme Court turn on a finding that ad valorem tax exemption was not a part of the contract, rather than a holding that a contract for tax exemption exists which might be abrogated without violating the federal constitution. Appellants argue, however, that this court has in the past looked independently at the question of whether a contract exists rather than accepting a state court's determination of the existence

or scope of a contract as binding. This may have been true in the past but this determination under the facts of the present case, is so completely foreclosed by decisions of this court as to leave no room for real controversy.

First and foremost, the decision of Straughn v. Camp, supra, considered controlling by both of the state courts below should control here as well. That case dealt with an identical scheme for the development of the portion of the same island, Santa Rosa Island, lieing in a different county, Escambia County. A special act of the legislature had set up an authority with the power to lease the property for development purposes. The special act also provided for ad valorem tax exemptions. The taxpayers who litigated Straughn v. Camp claimed that the same provisions of Chapter 71-133, Laws of Florida, as are under

attack here impaired the obligations of their leasehold contracts. The trial court ruled in favor of the taxpayers on their impairment of contract argument. On appeal, the Florida Supreme Court, in a detailed opinion, considering other issues raised by the taxpayers as well, reversed. In support of its ruling on the impairment of contract argument, the Florida Court in Straughn v. Camp cited to this court's decision in Wisconsin and Michigan Railway Co. v. Powers, 191 U.S. 379, 24 S.Ct. 107, 48 L.Ed. 229 (1903) as one of the controlling authorities. See 293 So.2d at 692, 695.

The Florida Supreme Court's opinion in Straughn v. Camp was appealed to this Court, which dismissed for want of a substantial federal question. Camp v. Straughn, 419 U.S. 891, 95 S.Ct. 168, 42 L.Ed.2d 135 (1974). The facts of the

present case are strikingly similar to those in Straughn v. Camp. The parties are different; however the same statute is attacked as an impairment of contract for exactly the same reasons under virtually identical circumstances. It therefore appears obvious that this Court's determination in Straughn v. Camp that there was no substantial federal question would carry considerable weight as stare decisis in this case as well. In Hicks v. Miranda, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975) this court held that a memorandum decision by it dismissing a direct appeal from a decision of a state court upholding a state statute against a federal constitutional attack was entitled to the weight of stare decisis, the Court saying

> ...if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.

In the present case, appellants have not indicated any doctrinal developments which have occurred since 1974 which would compel review of this case in the face of the Court's refusal to review Straughn v. Camp.

As noted above, the Florida Courts have regarded the decision in Wisconsin & Michigan Railway Co. v. Powers, supra as the controlling precedent out of this Court on the point. In Wisconsin & Michigan Railway, the State of Michigan had enacted a statute in 1893 exempting from taxation any railway company building and operating a railroad line in a certain portion of the state for a period of ten years or until the gross earnings equaled $4,000 per mile. The taxpayer constructed a railroad in that portion of the state which never earned $4,000 in gross revenue per mile. In 1897 the Michigan legislature repealed the tax

exemption. The railroad filed suit to enjoin the collection of tax, claiming that the law which imposed the tax impaired the obligation of contracts.

This Court, in a unanimous opinion authored by Mr. Justice Holmes held that there was no impairment of obligation of a contract, because under the facts of the case, there was no contract. The Court distinguished this case from those where it was held that an exemption from taxation contained in a special charter could not be repealed.

The Court rejected the presence of a contract first on general principles of contract law. This Court recognized that the building of the railroad constituted a sufficient detriment to be consideration and that the tax exemption in the earlier statute could be viewed as a promise. Nevertheless, the Court found that there was not sufficient mutuality to form a

legally binding contract, saying,

> But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or the detriment induces the promise, if the other half is wanting. 191 U.S. 386 , 24 S.Ct. 108.

This analysis is very much applicable to the present case. It may very well be that the legislation enacted in 1953 was part of the inducement for the Hords to enter into their lease agreement with the Island Authority. However, the lease could not in any way have been an inducement for the tax exemption statute which had been enacted five years earlier.

After rejecting the presence of a contract on narrow considerations of contract law, the Court in Wisconsin &

Michigan Railway turned to a consideration of the nature of legislative tax exemptions to foster economic development, and held that this situation did not lend itself at all to the creation of a binding contract. The Court commented,

> The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy, and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore, it makes no promise to them. It merely indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in, and action on the faith of, a statute, merely because their interest was obvious and their action likely, on the face of the law. 191 U.S. 387 , 24 S.Ct. 108-109.

Consistent with the foregoing, the Florida legislature in 1953 did nothing more than

make a policy pronouncement when it declared the property in question exempt from ad valorem taxation. It certainly did not specifically address the Hords with this promise of exemption even though it may have been foreseeable that persons like the Hords might have attempted to take advantage of the exemption. This does not prevent the legislature from changing public policy as it did in 1971, and repealing the exemption.

Of the various cases cited in Appellants' Jurisdictional Brief, the only one which comes close to being on point is that of McGee v. Mathis, 71 U.S. 143 (1866). This case was decided well before the Wisconsin & Michigan Railway case. In any event, McGee is distinguishable from the present case. In McGee the State of Arkansas set up by statute a scheme for reclaiming certain swamp

lands. Those who contracted for the reclamation project were to be paid in scrip which was redeemable out of the lands held by the state, unclaimed by others. The land so conveyed was exempted by statute from ad valorem taxation for a period of ten years or until reclaimed. In less than ten years, the exemption was repealed. A local levy on unreclaimed lands for the purpose of reclamation was sought to be imposed. It was this levy which was struck down as an impairment of the obligation of contract. The fundamental distinction between McGee and the present case is that in McGee, the conveyance of land in a tax exempt status in redemption of scrip was the contracted reimbursement which contractors were to receive for reclamation work. In the present case no work or detriment inure to the state for which the tax exemption is part of the compensation. Moreover, in

McGee, the Court appears to have been struck by the logical inconsistency of imposing a special tax for the same purpose (reclamation) for which the lands were originally conveyed tax exempt. Since the taxes at issue in the present case are imposed by the school board and county for general purposes, there is no such inconsistency herein.

POINT III

THE DECISION BELOW RESTS ON STATE LAW GROUNDS WHICH ARE ADEQUATE AND ENTIRELY DISPOSITIVE OF ALL ISSUES BEFORE THE SUPREME COURT OF FLORIDA.

As noted above, Appellants take the position that the question of whether there is a contract to begin with in impairment of contract cases is itself an issue which this Court has examined independently without being bound by state determinations. At most, however, this determination has gone only to the technical legal question of whether the facts reveal the presence of a contract. In the present case, the case which the Florida Supreme Court had considered controlling precedent, Straughn v. Camp, supra, had also held, under circumstances indentical to those found in the present case, that a political subdivision of the State of Florida lacked authority under the Florida Constitution and law to con-

tract for a tax exemption. Thus, the Florida Supreme Court noted,

> As before stated, there was no binding obligation on the part of the County or the Authority or the State, nor could there have been one constitutionally entered into by any of them, that never in the future could the legislature impose an ad valorem tax on plaintiffs' leasehold interests. 293 So.2d at 695, emphasis added.

The very limited extent to which a political subdivision in the State of Florida may contract with a private party for a tax exemption consistent with the state Constitution is set forth in Lykes Bros., Inc. v. City of Plant City, 354 So.2d 878 (Fla. 1978).

Whatever issues may properly be open to consideration by this Court, the question of whether the state's political subdivisions have authority under the State Constitution to contract for tax exemptions is a purely state question.

Where it is answered in the negative, as it has been under the facts below, it forecloses any necessity for a consideration of whether other elements necessary for a contract are present, or whether, otherwise assuming the presence of a contract for a tax exemption, the repeal of the exemption could be said to impair the obligation of a contract. Since in the present case, there was no authority to contract for an exemption, it was unnecessary for the Courts below to determine a federal question.

Under these circumstances, the operative jurisdictional principle is concisely stated in this Court's decision in Honeyman v. Hanan, 300 U.S. 14, 18, 57 S.Ct. 350, 352 (1937) as follows:

> Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to

> the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. (emphasis added)

It is clear from other decisions of this Court that review will be denied where it is not demonstrated that a decision on the federal question was necessary to the decision appealed. Flourney v. Weiner, 321 U.S. 253, 64 S.Ct. 548, 88 L.Ed. 708 (1944). See also Armstrong v. Armstrong, 305 U.S. 568, 76 S.Ct. 629, 100 L.Ed. 705 (1956).

In addition to the above authorities, this Court's decision in Fox Film Corp. v. Muller, 296 U.S. 207, 56 S.Ct. 183 (1935), makes it clear that where a decision on state grounds below removes the necessity for considering the federal question, review will be denied. That is precisely the situation presented by the appeal at bar.

CONCLUSION

Wherefore, Appellees respectfully submit that this Court does not have jurisdiction to entertain an appeal in this matter and further that the question presented by this appeal is so insubstantial as to warrant no further argument. Appellees respectfully move the Court to dismiss the appeal or, in the alternative to affirm the judgment entered in the cause by the Supreme Court of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to Mr. Jerris Leonard, Esquire, Leonard, Cohen, Gettings and Sher, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006; Mr. George W. Dean, Esquire, P. O. Box F, Destin, Florida 32541; Mr. Norton Bond, Esquire, 300 East Government Street, Pensacola, Florida 32501; and Mr. Matthew W. Burns, Esquire, 106 West Azalea, Long Beach, Mississippi 39560 this 6th day of October, 1978.

Respectfully submitted,

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